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Marriage below the Statutory Age--Effect of Cohabitation after Arriving at the Age

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STUDENT NOTES

MARRIAGE BELOW THE STATUTORY AGE—EFFECT OF COHABITATION AFTER ARRIVING AT THAT AGE.

A statute in Ohio[1] declared that male persons eighteen years of age and females who were sixteen could be joined in marriage—provided that male persons under twenty-one and females under eighteen should first obtain the consent of their parents. On April 5, 1877, James Dick, twenty-one, married Irena Holtz, who did not become sixteen until May 1st. Parental consent, as required by the statute, was not given to the marriage. After the marriage had subsisted for two weeks, the wife's mother, actuated by malice toward the son-in-law, induced her daughter to separate from him and return to the home of her parents. Evidence showed, however, that Dick and his child-wife, even while living apart, still considered each other as husband and wife, and that they both surreptitiously exchanged letters placed in a gate post. The wife's letters bore such salutations as "Dear Husband," "Kind Husband," and were signed "Irena Dick," showing the affection of a loving wife. Such relations continued from April 5, when the marriage was contracted, until September 1, four months after the wife had reached the statutory age of sixteen. Dick then sued the parents for maliciously causing his child-wife to separate from him, and recovered a judgment of $2,000. The parents defended on the ground that the marriage of their daughter to Dick was invalid in that it was contracted without parental consent before she had arrived at the age required by the statute. But the Supreme Court of Ohio, in sustaining the judgment, held that, although forbidden by statute, nevertheless, the marriage became irrevocable when the wife cohabited with her husband after she had reached the statutory age of sixteen.[2] The direct tenor of this decision is that a marriage voidable because of nonage, or lack of parental consent, becomes perfectly valid and binding if ratified by cohabitation after the disability of nonage has been removed.

It will be observed that cohabitation does not necessarily imply or encompass sexual intercourse. Certainly it does not mean sexual relations alone. Properly speaking, the term "cohabitation" connotes living together as husband and wife, and enjoying mutually the society, consortium and conjugal bliss, incident to the marital status.[3] It is agreed that the cohabitation of the parties in the case given was not of the highest order. This could not be when the marriage had been split asunder at the instance of a meddlesome mother. But even though

[1] Rev. Stats., Sec. 6384.
[2] *Holtz* v. *Dick*, 42 Ohio State 23, 51 Am. Rep. 791 (1884).
[3] Madden, Domestic Relations, pp. 67 and 148.

the husband and wife lived apart, the intent to remain married continued. Indisputably it was evinced by the letters interchanged between them that they still considered each other as husband and wife. And in the estimation of the court this of itself constituted the cohabitation necessary to ratify the hitherto voidable marriage, notwithstanding sexual intercourse after the wife reached sixteen was not shown.

At common law a marriage contracted below the age of seven was absolutely void; marriage after reaching the age of fourteen for boys and twelve for girls was just as valid as was an adult marriage; whereas a marriage between the ages of seven and fourteen for boys, and between seven and twelve for girls, being inchoate and imperfect, could be avoided by either party before or after reaching the age of consent. But if upon reaching the age of consent the parties to a marriage, voidable on account of nonage, continued to live together and cohabit, this was a sufficient affirmance and ratification of the hitherto voidable marriage.[4] Moreover, the consent of parents was not essential at common law to make a voidable marriage valid if cohabitation took place after the parties had reached the age of consent.[5]

Most states have enacted legislation increasing above the common law level the ages at which marriage may be contracted. The most generally adopted standard is eighteen for males and sixteen for females,[6] the rule in fifteen jurisdictions. But judicial pronouncements under the statutes have almost invariably adopted the common law view that a marriage voidable when contracted because of nonage becomes valid absolutely, if ratified by cohabitation after reaching the required statutory age.[7] A recent New York case enunciates this doctrine and appears to represent the law as it exists in most American states: A mother sought to annul the marriage of her son on the grounds of nonage. Evidence showed that after the son reached the age required by statute, he had cohabited with his wife. In holding the marriage valid, the court declared: "A marriage contract entered into before the requisite statutory age is voidable; but if after arriving at that age the infant continues in the marital relation, he is conclusively presumed to have ratified his contract. This is not only the law but a different holding would be a monstrous doctrine and contrary to public policy."[8]

The writer subscribes to the position taken by the New York court as being both sound and salutary. The statutory age required for marriage corresponds in a large measure to the age of majority, when

[4] Ibid., Sec. 13, pp. 28-29.
[5] Vernier, American Family Laws, Vol. 1, Sec. 30, p. 119.
[6] Ibid., Sec. 29, pp. 115-116.
[7] *Smith* v. *Smith*, 84 Ga. 440, 11 S. E. 496 (1880); *Powers* v. *Powers*, 138 Ga. 64, 74 S. E. 759 (1912); *State* v. *Parker*, 106 N. C. 711, 11 S. E. 517 (1890); *May* v. *Meade, et al.*, 236 Mich. 109, 210 N. W. 305 (1926); *Herrman, et al.* v. *Herrman, et al.*, 93 Misc. Rep. 315, 156 N. Y. Supp. 688 (1916); *Holtz* v. *Dick, supra*, note 2.
[8] *Long* v. *Baxter*, 77 Misc. Rep. 630, 138 N. Y. Supp. 505 (1916).

infants are deemed capable at law to make ordinary binding contracts. It cannot be doubted that most contracts made by infants before reaching that age are voidable, and that such contracts may be ratified by them after reaching twenty-one.[9] No logical reason can be given why this rule should not apply with equal effect to the marriage "contract." Certainly if upon reaching the required ages, the parties signify their desire to continue the marriage relation by cohabiting with each other, this would be cogent evidence that the marriage had proved satisfactory and that the parties desired to ratify their voidable "contract".

That a marriage, voidable for lack of age, becomes valid and binding upon cohabitation after reaching the required statutory age, is evidenced by the number of cases showing conviction for bigamy when a subsequent marriage was contracted.[10] Certainly one could not be convicted of bigamy unless a valid prior marriage subsisted at the time of the second marriage. Of course the same convictions would have resulted had the first marriage been voidable only, for a voidable marriage is valid until set aside by judicial decree.[11] But in every instance the courts in the bigamy cases cited proceeded further, and held that the voidable marriages had been ratified by cohabitation after reaching the ages set out in the statutes, thus making them perfectly valid. Therefore a conviction for bigamy was proper when a second marriage was contracted.

Moreover it is submitted that the same practical result has been reached, even though parental consent was not given to the initial marriage.[12] As at common law, it seems that the salient factor in making the marriage voidable at the outset is nonage, rather than lack of parental consent; and cohabitation after reaching the statutory age cures both defects in the hitherto imperfect marriage.[13]

Let us now discuss the problem in Kentucky: Is the marriage of a boy under sixteen or a girl under fourteen (the statutory ages) valid, if ratified by cohabitation after reaching those ages? It is contended that Kentucky follows the general rule, and that cohabitation after attaining the ages required by the statute confirms and makes absolutely valid the marriage which up to that time was voidable, either by the party under age or his next friend. Because of the dearth of adjudicated cases involving this point it must be said that this conclusion is reached by adverting to only one Kentucky decision, and by properly interpreting the Kentucky statutes which bring the problem within their purview.

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[9] Williston on Contracts, Sec. 239, p. 463.

[10] *Walls* v. *State*, 32 Ark. 565 (1877); *State* v. *Cone*, 36 Wis. 498, 57 N. W. 50 (1893); *State* v. *Yoder*, 113 Minn. 503, 130 N. W. 10 (1911); *State* v. *Parker*, *supra*, note 7.

[11] *Kibler* v. *Kibler*, 180 Ark. 1152, 24 S. W. (2d) 867 (1930). Also cases cited in footnote 7.

[12] *Vernon* v. *Vernon*, Ohio Decisions 365, Wkl. Law Bul. 237 (1891).

[13] 18 R. C. L. Marriage, Sec. 78, p. 447.

Section 2097, enacted in 1928 as amending Section 2100, expressly prohibits and declares void a marriage if, when contracted, the male is under sixteen, or the female is under fourteen years of age. This section also prohibits bigamous marriages, as well as intermarriage between whites and negroes.

Section 2100, passed in 1893, is equally emphatic, and states that courts having proper jurisdiction may declare void a marriage which was contracted without parental consent before reaching the requisite statutory ages, and which *has not been ratified* by cohabitation after that age.

Section 2115, which became law in 1894, enunciates that when one of the parties to the marriage is within the statutory age, *that person* or his next friend *may have the marriage annulled*, but that the party of proper age shall have no proceeding against the party under age in avoiding the marriage.

There is an apparent conflict between these sections of Kentucky law, regarding the validity of child marriages. Section 2097 declares them void; Sections 2100 and 2115 declare them voidable. Moreover the objection has been interposed that Section 2097 was meant to nullify Sections 2100 and 2115, since it was passed in 1928 as amendatory to Section 2100 which was enacted in 1893. This would make a marriage under age void, and not voidable merely. This objection, however, seems ill-founded in the light of the Kentucky case cited in footnote 15, infra. The objection is further weakened when it is known that most courts generally construe apparently conflicting passages of the law in such a manner as to lend validity to each of them.

Construing conjointly, then, Sections 2097, 2100, and 2115 as set out above, it will appear that a marriage within the statutory age in Kentucky is not void, as Section 2097 purports to make it, but is voidable only[14] at the suit of the party under age. This position is distinctly upheld by the dictum in the Kentucky case adverted to above which case was determined four years after section 2097 became law.[15] In the course of the opinion the court said: "It is very plain that notwithstanding Section 2097 positively declares a marriage void when at the time it is consumated the male is under sixteen, or the female is under fourteen, yet the marriage under Section 2100 may be avoided in a court of equity, if the marriage was contracted without the consent of the parent." And altho the question of cohabitation was not involved in the above litigation, without doubt this case subscribes to the proposition that in Kentucky, where the only impediment to marriage is the nonage of one of the parties, such marriage is valid absolutely, *unless* it is annulled by the party under age, or his next friend, as stipulated in Section 2100 and Section 2115. This makes Kentucky's position emphatic in holding that where one of the par-

[14] Ky. Statutes, Secs. 2100 and 2115.

[15] *Crummies Creek Coal Corp.* v. *Napier*, 246 Ky. 569, 66 S. W. (2d) 339 (1932).

ties is under age when the marriage is solemnized such marriage is *voidable* only and *not* void. In fact, guided by this decision, it would hardly be dogmatic to reiterate with certitude this conclusion, and to relegate into oblivion the notion that a marriage in Kentucky is void where the only impediment is lack of age. This result is indispensable in sustaining our major premise that a marriage under age may be ratified by later cohabitation, for if such marriage were to be declared void *ab initio*, it is very palpable that such marriage could not later be ratified, inasmuch as a void marriage, is invalid *in toto* from the very date of its inception.

Furthermore, the above adjudication goes a long way toward saying that a marriage statute apparently mandatory in all respects may be interpreted as mandatory in certain parts and directory only in other parts.[16] This principle has been well exemplified in the state of Maryland. The statute in that jurisdiction declares that "no person shall be joined in marriage until a license has been obtained." Moreover the state has consistently refused to sanction the common law marriage as violating both the letter and the spirit of the statute. Yet, in a recent decision it was held that a religious ceremony was the only essential to a valid marriage, and that the other provisions in the statute were directory only.[17] Bearing in mind the above discussion, it would be most reasonable to entertain this theory with regard to Kentucky statute, Section 2097, holding it mandatory with respect to bigamous and miscegenetic marriages thereby making such marriages void absolutely, and directory only with regards to nonage, making such marriage merely voidable, and capable of subsequent affirmance as well as disaffirmance. This view is materially strengthened when we note that Kentucky Statutes, Section 2098, expressly legitimates the offspring of a marriage where the only disability is nonage, whereas it brands with the stigma of illegitimacy the descendants of incestuous and miscegenetic marriages.

Kentucky Statutes, Section 2100, says that a court having general equity jurisdiction may declare void a marriage where the male at the time of marriage was under sixteen or the female was under fourteen, which marriage was contracted without the consent of the parent, and which *has not been ratified* by cohabitation after those ages. The only logical interpretation of this section of the law is that, although, voidable at the outset because of nonage and want of parental consent, such marriage, regardless of its previous deficiencies and discrepancies, becomes a valid marriage, which cannot be annulled *if* and *when* it is ratified by cohabitation after reaching sixteen for males and fourteen for females. Section 2100 is couched in negative language. It declares that a marriage when the parties thereto are under age, may be declared void if cohabitation *has not taken place* between the parties after reaching the statutory ages. This is

[16] Madden, Domestic Relations, Sec. 23, pp. 64-65.
[17] *Feehley* v. *Feehley*, 129 Md. 565, 99 Atl. 663 (1916).

tantamount to saying that such marriage would be binding absolutely and would not be amenable to annulment, if cohabitation had taken place after reaching those ages.

As eminent an authority as Vernier[18] tells us that in securing an annulment, the basis of which is nonage, "no annulment shall be granted in these jurisdictions (of which Kentucky is one) if after the removal of the disability of nonage, the parties have freely cohabited as husband and wife." The direct consequence of this statement is that the marriage at the outset is voidable, and that it becomes valid, binding and perfect in all respects by cohabitation after reaching the required ages. This view is entirely consonant with the writer's interpretation of Kentucky Statute 2100 and is in accord with both the common law and the general rule most widely adopted under the statutes.

In connection with the problem just discussed, another question presents itself. Is the marriage of a male under sixteen or a female under fourteen valid until declared to be a nullity by a court having proper jurisdiction? An attempted determination of this question is tendered.

Let us assume that when this marriage was solemnized the only disability was nonage, and that other statutory requirements were fully complied with. In that case the marriage would be *voidable*, but *valid* until set aside by a court decree.

Incestuous marriages and miscegenetic marriages contravene the voice of nature; they offend decency and morals; and are positively interdicted in most jurisdictions. Moreover, such marriages are void *ab initio;* they can never be ratified; and generally need no judicial decree declaring their nullity.[19] In addition the progeny of such marriages have in most instances been pronounced illegitimate both by statute and by judicial decision.[20] On the other hand where the only impediment is nonage, although such marriage may be indiscreet and unwise, and may subject youth and inexperience to the arts of the cunning and unscrupulous, yet it is lacking in the vicious and corrupting properties of a marriage within the prohibited degrees of affinity and consanguinity, or of an interracial marriage.

Doubtless these aspects have had an appreciable influence upon the courts, for almost universally they have held that a marriage below the statutory age, if above the common law age, is voidable

[18] Vernier, American Family Laws, Vol. 1, Sec. 51, p. 259, note 9 (1931).

[19] Madden, Domestic Relations, Sec. 15, pp. 33–36, Sec. 17, p. 17, pp. 38-39; Vernier, American Family Laws, Vol. 1, Sec. 38, pp. 173–179; Sec. 44, pp. 204-205.

[20] Ky. Statutes, Sec. 2008, "The issue of all illegal marriages shall be legitimate, except those of an incestuous marriage and those of a marriage between a white person and a negro or a mulatto." *Moore* v. *Moore*, 30 K. L. R. 383, 98 S. W. 1027 (1907).

only, and not void.[21] And what is more, most courts have gone a step further and have explicitly held that such voidable marriages are valid for all civil purposes until annulled by a court of competent jurisdiction.[22]

Marriage within the required statutory age is a marriage on condition subsequent, the conditions being its disaffirmance by either party thereto before ratification after reaching that age,[23] or annulment thereof by a proper court. Like other valid contracts in this respect, the obligation arises when the marriage is instituted, and it remains binding unless and until the conditions happen. This is just another way of saying that a marriage, voidable for nonage, is valid and binding just as is the most perfect marriage, until its nullity is pronounced by a competent tribunal. Without doubt this is the majority view; and judging from the array of authority cited in footnote 22 above, and from other sources at the writer's command, it would appear that this principle is so firmly entrenched in the law as to be incontrovertible.

Reverting more particularly to our Kentucky statutes (Sections 2097, 2115 and 2100 *supra*) we may safely conclude that a marriage contracted under the sole disability of nonage is voidable only, and not void,[24] for Section 2115 expressly provides that the party under age may have the marriage annulled. If the marriage were void *ab initio*, it should be quite superfluous to specify a judicial procedure whereby such marriage may be declared void. Since a marriage under age, then, is voidable only, just what is the legal status of that marriage during the interim between its contraction and subsequent annulment by a competent court, or ratification after reaching the statutory age?

Only one decision involving this precise question has been handed down by the Kentucky Court, but from that decision alone we are able to deduce this emphatic position: A marriage below the statutory age if above the common law age is valid and binding absolutely in Kentucky until it is declared null and void by a court in equity. In order to sustain this contention it will not be amiss to discuss the Kentucky case. One Napier had been awarded compensation under the Workmen's Compensation Law as a result of the accidental death

[21] Vernier, American Family Laws, Vol. 1, Sec. 29, p. 118; *State* v. *Lowell*, 78 Minn. 166, 80 N. W. 877 (1899).

[22] *Willits* v. *Willits*, 76 Nebr. 28, 107 N. W. 379 (1916), 18 R. C. L., Marriage, Sec. 70, p. 442; *Sturgis* v. *Sturgis*, 51 Ore. 10, 93 Pac. 696 (1908); Schouler, Marriage, Divorce, Separation, and Domestic Relations, 6th ed., Sec. 14, p. 19 (1921); *Holtz* v. *Dick*, *supra*, note 2; *Walls* v. *State* and *State* v. *Cone*, *supra*, note 10; *State* v. *Lowell* (Minn.), 46 L. R. A. 440, 80 N. W. 877 (1899); *Harrison* v. *State*, 22 Md. 468, 85 Am. Dec. 658 (1863).

[23] Madden, Domestic Relations, Nonage, Sec. 13. Kentucky by Statute, Sec. 2115, extends the privilege of annulment only to the person under the disability of nonage, or his friend.

[24] *Supra*, notes 14 and 15.

of Dillard Napier during the scope of his employment for the Crummies Creek Coal Corporation. Kentucky statute 4894 provided that such compensation should continue until death, or until subsequent legal marriage. After the award of compensation had been made, Napier married May Hicks, age thirteen. The company was apprised of this marriage, and sought to have the compensation stopped, whereupon Mr. Napier endeavored to show that his marriage was not legal or valid. But the court held that under Section 2115 of the Kentucky statutes, only the party under age could contest the validity of a marriage contracted below the required age, and that he was denied the remedy. Napier's marriage to May Hicks, who was under age when the marriage was solemnized, was held valid, and his compensation was stopped.[35] Not only does this case support the proposition that a marriage under age is valid until avoided by the party under age, as stipulated in Section 2115 but it also unequivocably modifies Section 2097, which declared a marriage under age void, and holds that such marriage is voidable only. Without doubt if this marriage under age had been void *ab initio*, Napier would never have lost his compensation, since a void marriage is not a legal marriage in the contemplation of the law, and his compensation could stop only upon contracting a legal marriage. But the court did not hesitate to hold his marriage legal, even though his child wife was only thirteen when he married her. This decision definitely settles the question in Kentucky that a marriage under age is voidable only at the instance of the party under age and that such marriage is valid in all respects until and unless the party under age avails himself of the statutory remedy before cohabitation between the parties after reaching the required age.

Our path is further illumined when we note the position taken by the state of Arkansas. The statutes relative to marriage in that state are similar in most respects to those in Kentucky, and it is rather impressive to observe that in a decision determined there in 1930,[36] the word "void" in the language of the statute was construed as meaning "voidable." Furthermore, the court went on to say that the marriage of a person under the statutory age was a voidable marriage, and that such marriage imposed the obligations of the marital status upon the contracting parties until its nullity had been pronounced by the proper court. The unmistakable import of this decision is that a marriage under age is voidable, but valid temporarily at least, and that its validity subsists until the marriage is abrogated by a judicial decree.

When we consider the nature of marriage we are by no means overwhelmed at this result. The state is vitally interested in the institution of marriage, not only because it is the foundation of the American home, but also because it is irretrievably rooted in our complex social structure. Therefore it is right that the state should regu-

[35] *Crummies Creek Coal Corporation* v. *Napier*, *supra*, note 15.
[36] *Kibler* v. *Kibler*, 180 Ark. 1152, 24 S. W. 867 (1930).

late marriage, and should specify by statute just who may marry and just at what age marriage may be contracted. The law has always deemed infants to be affected with an imbecility of judgment, and for that reason, incapable of giving their consent to marry before they reached a certain age. Child marriages militate against the proper education and culture of youth; and because most boys and girls are of innate unstable disposition, early marriages are frequently conducive to unhappiness for both parties throughout life. It is to obviate these conditions that statutes have been enacted requiring a relatively mature age before the marriage union may be entered. Without doubt such statutes were designed primarily to protect adolescent boys and girls from the precipitancy of their own injudicious acts when contemplating the marriage relation. But regardless of the undesirability of child marriages, if the only disability is nonage, it does not require the astuteness of a philosopher to apprehend that, once the marriage has been consummated, courts will go a long way in lending validity to such marriage since the parties could never assume their original status. Public policy and the importance of the martial status itself dictate such a procedure.

To summarize, the writer submits that the following propositions represent the law in Kentucky:

1. The marriage of a boy under sixteen or of a girl under fourteen would be perfectly valid if ratified by cohabitation after reaching those ages, although parental consent to the initial marriage was not obtained.

2. The marriage of a boy, under sixteen or of a girl under fourteen is not void, but is voidable only, and is valid for all civil purposes until annulled by a proper judicial pronouncement.

TOWN HALL.

WILLS—ADVANCEMENTS.

An advancement is a gift from a parent, or one who stands in *loco parentis*, to a child, which is to be charged to the child in the distribution of the parent's estate. Such gifts are usually made for the purpose of establishing or "advancing" the child in life. When so made it is unnecessary to present evidence that the parent intended the gift to be charged. The intent is presumed.

The doctrine of charging children with gifts from their parents in the settlement of the estate of the parents is of ancient origin. As might be surmised, it is designated to place all of the children on an equal footing and to prevent an undue preference of those who receive substantial gifts during the lifetime of the parents.

Strictly speaking, an advancement can exist only where the parent dies wholly or partially intestate. By analogy, however, the principle has been extended to cover gifts made after the execution of a will in which the children are named as devisees or legatees. It also